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20 May 1986

MEMORANDUM FOR THE RECORD

SUBJECT: 20 May Senate Labor & Human Relations Committee
Markup of S. 1815 - Polygraph Legislation

1. On 20 May 1986, I attended the "markup" by the Senate Labor and Human Relations Committee of S. 1815. This bill, the "Polygraph Protection Act of 1986", was introduced by Senators Hatch and Kennedy and referred to the Labor and Human Relations Committee which Senator Hatch chairs and on which Senator Kennedy is Ranking Minority Member. This was the second time the bill was on the Committee schedule. The first time the entire Committee schedule for that date had been cancelled due to the inability of the Committee to obtain a quorum (due, in part, to several Members' desire to avoid a quorum which would enable the Committee to deal with several controversial nominations).

2. At the point S. 1815 was taken up, the Committee had just completed long and somewhat tiring action on a series of bills, including the National Science Foundation and human services authorization bills. As a result, the members were tired and their exchanges on the bills, particularly those involving Chairman Hatch, were somewhat more frank than usual.

3. Present for virtually the entire time S. 1815 was being considered were the following senators: Hatch, Kennedy, Quayle, Thurmond, Matsunaga, Pell, Kerry, Dodd and Stafford.

4. Chairman Hatch opened with the surprising announcement that he would recommend the Committee not entertain any amendments to the bill but instead report it out by unanimous

consent with no amendments. To this end, he indicated that he would not even offer his "national security" amendment (apparently he was referring to the governmental exception which this office had previously worked out with the Committee and other government agencies on behalf of the entire government) at that time but, instead, would offer it on the floor.

5. The Chairman said he was taking this action because of the diversity and number of amendments which he understood were likely to come up and the fact that, in all likelihood, the Administration would veto almost any bill on the subject including both S. 1815 and H.R. 1524, the bill which passed the House. If the Committee agreed to this approach, he would agree to work with all members to reach agreement on a compromise version. That compromise could then be effectuated through floor amendment of the bill (including the national security amendment). He left open the possibility of whether the Administration could accept a bill thus modified.

6. The Chairman then went on to note that if the Committee did not agree to this approach, he would proceed to markup. He promised, however, and directed this promise specifically towards his "friends" in the business community, that the result of such a markup would be a very "strong" bill in the sense that it would work against their asserted interests. He also noted that if the markup appeared to be taking too much time or if delaying amendments were brought up (which he said he understood had been prepared), he would move for cloture in the Committee. He stated that he knew for a certainty that he had the votes in Committee for cloture.

7. These and subsequent remarks by the Chairman demonstrated his very strong personal commitment to the legislation, the strength of which is made even more apparent by the fact that it runs very strongly contrary to his usual position of supporting "business" interests and taking the states' rights" position on most issues. Various other members of the Committee then remarked as follows.

8. Senator Kennedy concurred in the Chairman's remarks. He also noted a CBS "Sixty Minutes" program which, according to him, documented polygraph abuses through depiction of a "sting" operation on three private polygraph firms created by "Sixty Minutes" personnel.

9. Senator Simon concurred with Chairman Hatch's remarks but noted three things. He was in favor of an approach which would prescribe standards for polygraphs. He was in favor of an exemption for the drug industry. Finally, he was strongly supportive of the national security exemption.

10. Senator Dodd noted the total ban on polygraphs by his home state, Connecticut. He noted further that this total ban coexisted with a number of defense contractors in the state. He then noted that he would oppose all exemptions and/or would move to add to all exemptions a requirement that the results of the polygraph not be used as the sole basis for taking adverse personnel actions. It was possible, but not clear, that he intended this requirement to include even the national security exemption.

11. Senator Quayle said that the issue was one of federalism and that he did not like the bill. He also noted the basic illogic of banning the private use of the polygraph but continuing to allow its use in the most sensitive sectors of government.

12. Chairman Hatch then addressed Senator Thurmond (whom, it quickly became clear, was the principal spokesman on the Committee for those who opposed the bill), making to him, in a very direct and personal way, the offer he had made at the outset of the markup to the entire Committee.

13. In response, Senator Thurmond stated his opposition to the bill on constitutional grounds, noting that the federal government had no constitutional basis on which to enact such legislation. (Senator Hatch later countered that the "interstate commerce" clause of the Constitution provided such basis.) Senator Thurmond noted that he was joined in his opposition to the bill by Senators Wallop, Nichols, Hawkins and Quayle.

14. Chairman Hatch then repeated his offer but Senator Thurmond continued in his opposition. The discussion grew into an emotional confrontation between the two. Chairman Hatch noted his great support and respect for Senator Thurmond but stated that he was moved to take this action by his strong personal opposition to the misuse of polygraphs in the workplace. Senator Thurmond made similar statements of

personal admiration of Chairman Hatch but refused to directly address or take up the Hatch "offer." Instead, Senator Thurmond indicated his willingness to proceed to "markup" and to offer amendments in connection therewith.

15. As time was then running out, Chairman Hatch ruled that the bill was to be held over to the next Committee session, currently scheduled for June 18th. At that session, the Committee would "markup" the bill and consider all amendments. If not completed by the session after that (currently scheduled for July 30th), however, Chairman Hatch said he would move cloture on the bill.

16. Chairman Hatch repeated his earlier warning to his "friends" in the business community that the result of the day's action would be a "stronger" bill adverse to their stated interests. Chairman Hatch then adjourned the session.

17. At this point, the only actions necessary are to stay in contact with Kevin McGuiness of Senator Hatch's staff and to monitor the next Committee session on the bill.

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